IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

WP(C).No. 25110 of 2004(L)

OS.2057/2002 of II ADDL.M.C., ERNAKULAM

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PETITIONER:

SINDHUMOL, AGED 34,
D/O. SUBRAMANIAN, VATTATHARA HOUSE, CHENNOOR DESOM
KADAMAKUDY VILLAGE, KANAYANNUR TALUK.

BY ADV. SRI.P.N.RAMAKRISHNAN NAIR
SRI.P.VISWANATHAN

RESPONDENTS:

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1. **S.K.RAGHAVAN, AGED ABOUT 72,**
   SASTAMPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE, KANAYANNUR TALUK.

2. **K.P.STANES, AGED ABOUT 44,**
   KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE.

3. **K.P.JAMES, AGED ABOUT 47,**
   KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE.

4. **K.P.THOMAS, AGED ABOUT 52,**
   KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE.

5. **K.A.XAVIER, AGED ABOUT 48,**
   KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE.

6. **SHEELA XAVIER, AGED ABOUT 42,**
   KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
   KADAMAKKUDI VILLAGE.

7. K.A.ANTONY, AGED ABOUT 52,
KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
KADAMAKKUDI VILLAGE.

8. K.A.LONAPPAN, AGED ABOUT 54,
KODUVELIPARAMBIL HOUSE, CHENNOOR DESOM,
KADAMAKKUDI VILLAGE.

BY ADV. SRI.T.O.XAVIER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.25110/2004

APPENDIX

PETITIONERS EXHIBITS

EXT.P:- COPY OF THE PLAINT IN OS. NO./1349/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

EXT.P2:- COPY OF THE WRITTEN STATEMENT IN OS. NO.1349/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

EXT.P3:- COPY OF THE JUDGMENT IN OS. NO.1349/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

EXT.P4:- COPY OF THE PLAINT IN OS. NO.2057/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

EXT.6P:- COPY OF THE WRITTEN STATEMENT IN OS. NO.2057/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

EXT.P6:- COPY OF THE ORDER DT. 3.8.04 PASSED IN OS. NO.2057/02, ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.

/TRUE COPY/

P.A. TO JUDGE

tss

PIUS C. KURIAKOSE, J.

W.P.(C)No.25110 OF 2004

Dated this the 8th day of June, 2007

J U D G M E N T

Petitioner who is defendant in OS. No. 2057 of 2002, a suit filed by the respondents, impugnes in this writ petition under Article 227, Ext.P6 order passed by the learned Munsiff holding that Ext.P3 judgment in O.S.1349 of 2002 does not operate as res judicata for the subsequent suit O.S.2057 of 2002. According to the petitioner she came to have ownership and possession over 15.600 cents of land in survey No. 328 of Kadamakudy Village by virtue of document No. 1854 of 1988 of Narakkal Sub Registry and the property is situated in an Island by name Chennoor Island. In 1996 on the request of the respondents the petitioner formed a passage having a width of 4 links along the eastern boundary of the plaint schedule property, i.e. the property covered by document No.1854/88. On 3-8-2002 the respondents requested the petitioner to leave a further strip of land having a width of 3 feet by demolishing the existing compound wall and fencing so as to enable them to take motor vehicles. The petitioner and her husband were not agreeable and therefore respondents threatened the petitioner and her husband. The petitioner in the wake of the threats filed O.S.1349/02 before the

Munsiff's Court, Ernakulam for a decree of permanent prohibitory injunction restraining the respondents from trespassing upon the plaint schedule property by demolishing the eastern boundary wall and fencing and also from committing acts of waste thereon. In that suit first respondent filed written statement on behalf of the other respondents also claiming right of way by easement by prescription and necessity over a passage having a width of 12 ft. on the eastern boundary of the plaint schedule property. On 18-12-2002 the respondents filed O.S.2057 of 2002 praying for a declaration and other consequential relief in respect of the very same pathway having the width of 12 ft. as claimed in the written statement in OS.1349 of 2002. The petitioners filed written statement in OS. 2057 of 2002 denying the respondent's right of way through her property by way of easement claimed by them and pointing out the pendency of the suit filed by her in respect of the very same property. On 26-6-04 the court decreed OS.1349 of 2002 and restrained the respondents from trespassing upon the plaintiff's petitioner's property by demolishing the eastern boundary wall and fencing and also from committing any acts of waste therein. On obtaining certified copies of the plaint, written statement, judgment and depositions in OS.1349 of 2002 they were

produced by the petitioners in O.S.2057/02. Learned Munsiff raised an additional issue in the suit as to whether the judgment rendered in O.S.1349 of 2002 will operate as res judicata for O.S.2057 of 2002. Under the impugned order Ext.P6, the court below has held that the judgment and decree in O.S.1349 of 2002 does not operate as res judicata for O.S.2057 of 2002. Assailing Ext.P6 Sri. P.Viswanathan, counsel for the petitioner would argue that the learned Munsiff has missed the first principles governing res judicata as envisaged under section 11 of the Code of Civil Procedure. Counsel submitted that the claims put forward by the respondents in Ext.P2 written statement filed in Ext.P3 suit and in the present suit are one and the same, viz., claim over the very same pathway having width of 12 ft. through the plaint schedule property in Ext.P1 plaint by way of easement by prescription and necessity. Ext.P5 judgment which was rendered after trial on the basis of evaluation of evidence which was adduced by the parties will certainly operate as res judicata in the subsequent suit between the same parties in respect of the very same property. Counsel submitted that the learned Munsiff ought to have noticed that going by the pleadings of the respondents the cause of action for both the suits is one and same. The finding of the learned Munsiff that since

defendants 2 to 9 in the previous suit who are plaintiffs in the present suit had not filed written statement in the previous suit the matter cannot be held to have been finally heard and decided against them, is against the elements of civil procedure and practice. Mr. Viswanathan fortified his submissions on the basis of various authorities such as the judgment of a Division Bench of the Madras High Court in Menon v. Panchitra, 2003(2) KLT short note case No. 29 and that of the Supreme Court in K.Ethirajan v. Lakshmi, (2003) 10 SCC 578.

2. Sri.T.O.Xavier, learned counsel for the respondent would defend the impugned order on the reasons stated by the learned Munsiff in the order.

3. There is considerable merit in the submission of Mr.Viswanathan that the learned Munsiff while passing Ext.P6 order had not kept in mind principles relating to res judicata as envisaged by section 11 of the C.P.C. and as explained by binding judicial precedents. Principles of res judicata would include principles of constructive res judicata also. A careful perusal of the pleading in the previous suit and the subsequent suit will show that both suits are essentially in respect of the very same pathway having a width of 12 ft. through the plaint schedule property under Ext.P1 plaint by way of

easement by prescription and necessity. I do not know how the learned Munsiff could say that Ext.P5 judgment will not operate as res judicata in the subsequent suit in view of the reason that the plaintiffs in the subsequent suit who had been summoned to appear before the court in the former suit for settlement of issues had not filed written statement. As found by the Division Bench of the Madras High Court in Menons case (2003(2) KLT short note case No.29 applicability of principles of res judicata does not depend on the previous decision being ex parte or bi parte. In order that an ex parte decree will operate as res judicata all that is necessary is that the the defendant should have express notice of the pleadings and the prayer that a particular issue or matter would be decided. On going through Ext.P5 judgment it is seen that the same is a considered judgment rendered by the learned Munsiff on the basis of evidence recorded in trial. The doctrine of res judicata has been conceived in the larger public interest that litigation must, sooner than later, come to a quietus. So long as Ext.P5 judgment stands, that judgment will operate as res judicata as against the present suit which I find is instituted in respect of the very same subject matter and raising virtually the same claims. Having regard to the principles laid down by the Division Bench of the

Madras High Court and by the Supreme Court in various decisions including the decision in Ethirajan's case (2003) 10 SCC 578) it has to be held that the learned Munsiff's view that Ext.P3 judgment will not operate as res judicata for the present suit is erroneous. Allowing the writ petition I set aside Ext.P6 and hold that Ext.P3 judgment in O.S.1349 of 2002 will operate as res judicata for the present suit and that the court is not entitled to try the present suit or the issues therein in as much as the issues have been tried and decided by Ext.P3 judgment.

The writ petition is allowed as above.

(PIUS C.KURIAKOSE, JUDGE)

ksv/20208